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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: William C. Whitbeck, Helene N. White, and Pat M. Donofrio

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

LATASHA GENISE MORSON

Defendant-Appellee.

_____/

Supreme Court No. 124083

Court of Appeals No. 238750

Lower Court No. 99-167284 FC

OAKLAND COUNTY PROSECUTOR
Attorney for Plaintiff-Appellant

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GARY L. ROGERS (P54879)
Attorney for Defendant-Appellee

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DEFENDANT-APPELLEE'S SUPPLEMENTAL BRIEF

STATE APPELLATE DEFENDER OFFICE

BY: GARY L. ROGERS (P54879)
Assistant Defender
Attorney for Defendant-Appellee

3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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STATEMENT OF JURISDICTION

Defendant-Appellee relies on the jurisdictional statement set forth in her Brief on Appeal.

STATEMENT OF QUESTION PRESENTED

I. DOES THE UNITED STATES SUPREME COURT'S RECENT DECISION IN BLAKELY V WASHINGTON, 542 US ___; 124 S CT 2531; ___ L ED 2D ___ (2004) REQUIRE THAT MS. MORSON BE RESENTENCED?

Trial Court made no answer.

Defendant-Appellee answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellee relies on the Statement of Facts set forth in her Brief on Appeal.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S RECENT DECISION IN BLAKELY V WASHINGTON, 542 US ___; 124 S CT 2531; ___ L ED 2D ___ (2004) REQUIRES THAT MS. MORSON BE RESENTENCED.

This Court need not decide the constitutional question presented by the Untied States Supreme Court's decision in Blakely v Washington, 542 US ___; 124 S Ct 2531; ___ L Ed 2d ___ (2004), as Ms. Morson is entitled to relief on the statutory grounds briefed and argued to date. Correct application of the Legislative guidelines would score Ms. Morson only for Northington's use of a handgun, which Northington pointed at Sevakis: 15 points on OV 1 and 5 points on OV 2 – the same scores that would be compelled under Blakely. These facts were found by the trier of fact beyond a reasonable doubt – unlike the facts surrounding the shooting of James Bish. (200a). However, if this Court denies relief on statutory grounds or wishes to provide immediate guidance to the courts of this state on an issue of immediate consequence, the following analysis is offered.

Blakely applies to all cases currently pending on direct appeal. See Schriro v Summerlin, ___ US ___; 124 S Ct 2519; ___ L Ed 2d ___ (2004) (holding Ring v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002) applicable to all cases pending on direct review); Griffith v Kentucky, 479 US 314, 328; 107 S Ct 708; 93 L Ed 2d 649 (1987) (even new procedural rules apply to all cases still pending on direct review); Blakely, [11] (O'Connor, J., dissenting) ("Every

sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy," specifically referencing Michigan's statutory guidelines).

Under Blakely, where further fact-finding is legislatively required before a sentence can be increased – by increasing the guidelines range, departing from the guidelines, or otherwise – a criminal defendant has a right to a jury determination of those facts beyond a reasonable doubt, and those facts must be charged in the Information against her. US Const, Ams VI, XIV. In this case, the legislatively authorized range of punishment was impermissibly increased because the trial judge scored legislatively imposed sentencing guidelines variables to increase the guidelines range based on facts which were not charged in the Information nor determined by the fact-finder beyond a reasonable doubt.

In Blakely, the United States Supreme Court held that the defendant's sentence was constitutionally invalid. Blakely had pled guilty to an offense punishable by no more than ten years in prison. However, other statutes – namely the sentencing guidelines – also limited the range of sentences a judge could impose. A judge could exceed the standard guidelines range for "substantial and compelling reasons." In Blakely's case, the standard range was 49 to 53 months. The judge imposed an exceptional sentence of 90 months after finding that Blakely had acted with "deliberate cruelty." Blakely, [2-3]. Applying the principles set forth in Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) and its progeny, the Supreme Court found this sentence invalid because the judge increased the penalty for the crime based on facts which had neither been submitted to a jury nor proven beyond a reasonable doubt. Blakely, [7-9].

In doing so, the Blakely majority rejected the lynchpin of the prosecution's pre-Blakely argument in this case that the "statutory maximum" to which Apprendi applied was limited to the absolute maximum specified in the penal statute: "the relevant 'statutory maximum' is not the

maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." Id., at [7] (emphasis in original). The Blakely court emphasized that it is a judge's authority to sentence that is restricted by the jury verdict, Blakely, [10], and a judge exceeds this authority when a "jury has not found all the facts 'which the law makes essential to the punishment,'" [7]. See also Id. at [13] (describing "jury's traditional function of finding the **facts essential to lawful imposition of the penalty**"), and at [17] ("every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment"). In so holding, Blakely remained consistent with the **reasoning** (as opposed to the holding) of Apprendi that what was really important was that there be jury-proof of all facts which exposed a defendant to "greater or additional punishment" outside "the range prescribed by statute." Apprendi, 481, 486.

Justice Scalia, writing for the Blakely majority, went on to elaborate that

> "Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in Apprendi), one of several specified facts (as in Ring [v Arizona, 536 US 584; 122 S Ct 2428; 153 L Ed 2d 556 (2002)]), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact." Id., at [9] (emphasis in original).

Justice Scalia further made clear that the requisite finding of "substantial and compelling" reasons did not alter the analysis, because the judge could not make that determination without first finding some facts beyond the elements of the base offense to support it. Id., n 8.

A sentence is, thus, invalid not only when a judge departs upward from a statutory guidelines range, but also when the judge sentences a defendant within a higher range that was determined by facts neither admitted nor found by a jury beyond a reasonable doubt. In either case,

the judge has impermissibly exceeded the legislatively prescribed range of punishment (i.e., that described by the highest sentencing grid which can be constructed from the facts necessarily found by the jury). Scoring legislative sentencing guidelines to increase the range of punishment is constitutionally indistinguishable from departing from the correct range, and is only proper if the facts which justify that increase have been found by a jury beyond a reasonable doubt.

Nor does Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002) compel a different result. What Blakely, Harris, and Apprendi consistently describe as elemental facts, for which jury proof is required, are "those facts setting **the outer limits of a sentence, and of the judicial power to impose it**. . . ." Harris, 153 L Ed 2d at 544 (emphasis added). Harris, holding that McMillan v Pennsylvania, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986) was consistent with Apprendi, involved only a mandatory minimum. **Where a mandatory minimum is involved, the statutory range has a floor, but no ceiling.** Thus, the judge is authorized to impose, or even to exceed, the mandatory minimum without any additional fact-finding.

This is not so in a guidelines state like Michigan, in which the judge must not only impose a sentence of **at least** a certain magnitude, but also must impose one **no greater than** a certain magnitude, without finding facts which change the range of punishment or constitute substantial and compelling reasons for departure. Harris itself distinguishes mandatory minimums from guidelines-based systems: Apprendi does not constrain the imposition of mandatory minimums because "[t]he minimum may be imposed with or without the factual finding; the finding is by definition not 'essential' to the defendant's punishment." Harris, 153 L Ed 2d at 540. See also, Id. at 538.

Further, the limits imposed by Apprendi and Blakely are not matters of **notice about how much time one may serve,** but rather of **authority to sentence**. A judge's "authority to sentence" derives from the jury verdict alone. Blakely, 10. Elsewhere, the majority noted that, "When a judge

inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' Bishop, supra, §87 at 55, and the judge exceeds his proper authority." Blakely, 7. And, "As Apprendi held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Blakely, 17.

It is difficult to argue – and impossible under recent Michigan precedent – that increasing a sentence's length from, e.g., 85 months to 30 years to one of 96 months to 30 years is anything other than increasing the penalty beyond the statutorily prescribed range. See People v Kimble, 470 Mich 305, (2004), slip op at 9, n 5 (describing a five-year departure from the appropriate guidelines range as "sending a person to prison for a term several years in excess of what is permitted by the law"). In Michigan, one of the "outer limits" is set by the penal code (the absolute maximum), the other is set by the sentencing guidelines statutes (the maximum minimum), both of which circumscribe the sentence and both of which legislatively constrain "judicial power to impose" that sentence. See Harris, 153 L Ed at 544.

It is an understatement to say that Blakely has thrown the criminal justice system into a panic. In an attempt to stave off the perceived cataclysmic effects of Blakely in both the federal and state systems, some prosecutors, including some in Michigan, have begun to argue that Blakely simply does not apply to their particular state scheme. In Michigan, the argument has been made that Blakely does not apply because Michigan is an "indeterminate" sentencing state, in which the actual amount of time served is ultimately determined by a parole board rather than by a judge. Focus on the phrase "indeterminate sentencing," however, is not only a semantic distraction, but misses the substance of the real discussion in Blakely. Nor does the existence of a parole board have any bearing on the outcome.

It has been argued by some that language in part IV of the Blakely opinion excludes from its protections "indeterminate sentencing" schemes. Blakely, [12-13]. In so reading the opinion, the assumption is made that Michigan is, therefore, exempt because its sentences are "indeterminate" – because they are described by two numbers (a "maximum" and a "minimum") rather than one. The flaw with this position is that it inappropriately reads the language of a United States Supreme Court opinion as if it were written by a Michigan practitioner, using the terms as criminal justice practitioners in Michigan would understand them.[1]

"Indeterminate" in Justice Scalia's parlance describes a system of **unconstrained sentencing discretion**, as opposed to a "determinate" one in which the legislature has conditioned a sentence on certain findings of fact. Thus, the reason that the scheme in Williams v New York, 337 US 241; 69 S Ct 1079; 93 L Ed 2d 1337 (1949), was "indeterminate" was because the judge could have sentenced the defendant to death **without giving any reason whatsoever**. Blakely, [8].[2]

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1 A prime example of this misreading is an example Justice Scalia employs in refuting Justice O'Connor's dissent: "In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence. . . ." Blakely, [13]. A Michigan practitioner would look at the phrase "10 to 40 years" and see a single "indeterminate" sentence with a minimum and maximum term. In actuality, what Justice Scalia is describing is a single-number sentencing system, but one in which the judge has unfettered discretion. The judge could impose a term anywhere within the mandatory minimum 10 years up to the penal code maximum of 40 years without finding any additional facts – 11 years, 12 years, 40 years are all proper sentences without any further findings.

2 Moreover, Justice O'Connor, to whose dissent Justice Scalia is responding, also indicates that the reason Washington's scheme prior to 1981 was "indeterminate" was because judges had "**virtually unfettered discretion** to sentence defendants to prison terms falling anywhere within the statutory range." Blakely, [2], (O'Connor, J., dissenting) (emphasis added). She also specifically lists Michigan sentences as jeopardized by the majority opinion, , along with those in two other "2-number" sentence states (Pennsylvania and North Carolina). Id., [11] (O'Connor, J., dissenting). Notably, Justice Scalia, who devotes great attention to rebutting the dissenters, does not even suggest that Justice O'Connor overstated the problem by including "2-number" sentence states.

When the majority and dissenting opinions are read as a whole, it is clear that the distinction being made is between guidelines and non-guidelines states. Simply put, Michigan's sentencing scheme is "determinate," in the parlance of Blakely, because the legislative scheme specifies facts which determine what one's sentence will be – albeit in two places: the penal code section criminalizing the base offense, and the statutes setting forth the guidelines variables. It is a system of tightly constrained discretion, unlike the wide open "indeterminate" systems referenced by the justices in Blakely which give judges unfettered discretion to impose a sentence up to the penal code maximum.

It is not only the focus on determinate/indeterminate language, but also the emphasis on a parole board that is misleading. The central point of Blakely is that, where a legislature has conditioned punishment on the finding of certain facts, judicial fact finding (and, therefore, the resultant sentence) is **without authority** because it intrudes on the province of the jury:

> "the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. **It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.**" Blakely, [12] (emphasis added).

Blakely, just like Ms. Morson's appeal, is about the limits of what a **judge** can do in light of the power that our constitution reserves to **juries**. The relief being requested here is directed not at a parole board, but at a sentence imposed by a judge without authority. That the maximum sentence in Michigan is a range itself, as opposed to a single number, is also a distinction without a difference. Just as Blakely's "statutory maximum" sentence was the top of the standard range, as opposed to the ten-year absolute maximum imposed by the penal code, Ms. Morson's statutory maximum sentence was not simply "life," as specified by MCL 750.529, but included the top of that guidelines range described by those facts found by the jury beyond a reasonable doubt. Again, the

prosecution seizes on federal language ("maximum") and assumes that it has the same meaning as colloquially used in Michigan, when in fact what Blakely deals with is the **most** that a judge can do in imposing a penalty. ***At base, that a parole board can later determine whether or not to release a particular defendant does not change the level of discretion afforded the sentencing judge.***

This is best understood by looking to the constitutional underpinnings of Blakely. The first of the constitutional bases of Apprendi, which Blakely sought to apply, is the Fourteenth Amendment Due Process Clause, which protects against the deprivation of life, liberty, or property without due process of law. US Const, Am XIV. Simply put, in promulgating a comprehensive, detailed, and mandatory scheme to restrict judicial sentencing discretion, the Legislature did not engage in a meaningless act. In Fourteenth Amendment terms, a defendant has a statutorily created liberty interest in the **sentence** imposed by a judge when the Legislature conditions the terms of that sentence on the finding of certain facts – an interest in both the absolute maximum and maximum-minimum terms.

Departure from, or elevation of, the guidelines range through facts that are not jury-proven beyond a reasonable doubt is a judicial act which deprives a defendant of these liberty interests. By constraining not just one, but both, of the "outer limits" of a defendant's sentence, as well as the "judicial power to impose" it, the Legislature created exactly the sort of entitlement that merits constitutional protection under Blakely and its precursors. See Harris, 153 L Ed 2d at 544. That protection, as specified by Blakely, et. al., is no less than a jury determination, beyond a reasonable doubt, of any facts "essential to the punishment" as set forth by the Legislature. See Blakely, 7, 13, 17.

This is easily understood when one realizes that Blakely and Apprendi are founded not only on the Due Process Clause, but on the Sixth Amendment as well:

> "The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." Blakely, [10] (emphasis in original).

Pronouncing the guidelines scheme as constitutionally meaningless, as the prosecution asks this Court to do, would have precisely this result. Ms. Morson would be punished for armed robbery nominally, but actually punished for a more serious crime – the injurious shooting of James Bish – perpetrated by another person without jury proof of that crime or of her vicarious liability for it.

In sum, that Michigan sentences consist of two numbers rather than one is of no consequence to the constitutional analysis. Those sentences are still being elevated when the judge exceeds **either** the absolute maximum specified in the penal code, **or** the guidelines limit for the maximum-minimum which corresponds to the jury-found facts. Either act "inflicts punishment" without a jury finding of all the facts "which the law makes essential to the punishment," Blakely, [7], something to which every defendant has the right. Blakely, [17].

In Ms. Morson's case, this means that the scoring of points for the shooting of James Bish was constitutionally improper. The information did not charge her with discharging a weapon at a person (OV 1), causing bodily injury (OV 3), or endangering multiple victims (OV 9) – and there was neither a jury finding of these facts beyond a reasonable doubt nor a waiver of the right to a trial on those facts. Additionally, aside from the lack of findings on the shooting itself, there was no separate finding that Latasha Morson was guilty of aiding and abetting Northington in that shooting of Bish. (199a-201a). With or without Blakely, vicarious liability is an element, and one which was not proven here.

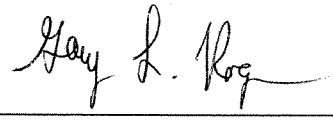
SUMMARY AND RELIEF

The appropriate remedy stems from Blakely's admonition: "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." Blakely, [12]. The basis of the Apprendi rule, extended by Blakely, is that what superficially appear to be mere "sentencing factors," used to enhance a sentence, are actually elements of an aggravated crime. Apprendi, 477-478, 484 n 10; Harris, 153 L Ed 2d at 534. As an aggravated crime and its base offense are necessarily included offenses, the Double Jeopardy Clause prohibits retrial on the greater offense following conviction of the lesser. US Const, Am V; Const 1963, art I, § 15; Brown v Ohio, 432 US 161, 168; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Thus, the only proper resolution here is to resentence Ms. Morson within the highest grid supported by the facts necessarily found by the trier of fact – in this case, the range of 51 to 85 months. MCL 777.62 (grid C-II for Class A offenses).

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court remand for resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

GARY L. ROGERS
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

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